PUA KIAM WEE v. KETUA PENGARAH IMIGRESEN MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
KAMARDIN HASHIM JCA
[CIVIL APPEAL NO: W-01(IM)-352-09-2016]
5 JULY 2017

ADMINISTRATIVE LAW: *Remedies – Certiorari – Exercise of administrative powers – Prohibition from leaving country – Validity – Whether decision amenable to judicial review – Whether must be in accordance with law – Whether must be substantively fair – Whether certiorari ought to be issued – Rules of the High Court 1980, O. 53 – Immigration Act 1959/63, s. 59 – Federal Constitution, arts. 5(1), 8(1)*

CONSTITUTIONAL LAW: *Personal liberty – Right of citizen to leave country and travel overseas – Right to travel with valid passport – Federal Constitution, arts. 5 and 9*

CONSTITUTIONAL LAW: *Courts – Judicial power – Power of High Court to review administrative acts and decisions – Whether fettered by ouster clause in statutes – Right to judicial review – Whether forming part of 'personal liberty' of a citizen – Whether imposing duty upon public decision-maker to act fairly – Federal Constitution, arts. 5(1), 8(1)*

The appellant was a holder of a valid Malaysian passport with an expiry date of 23 April 2020. On 22 July 2015, the appellant intended to travel to Yogyakarta, Indonesia. Whilst at the airport, the appellant alleged that an immigration officer informed him that he had been directed by his superior not to allow the appellant to travel abroad as he was being investigated under s. 124B of the Penal Code. Consequently, on 19 August 2015, the appellant filed for leave to commence judicial review proceedings against the respondents pursuant to O. 53 rr. 2 and 3 of the Rules of Court 2012 and sought, *inter alia*, a declaration that the order by the first respondent barring the appellant from leaving the country on 22 July 2015 was against the law and thus was invalid and void. The High Court Judge ('HCJ') held that the appellant had no constitutional rights to travel overseas and that the travel ban was in accordance with the law. On the appellant's contention that he had legitimate expectation of being able to travel abroad as at all material times he was a holder of a valid Malaysian passport, the HCJ emphasised that the respondents did not promise or represent to the appellant that with a valid passport he had a right to travel abroad. As such, there was no legitimate expectation for the appellant to travel abroad. The HCJ had also dealt with the issue of the exclusion of right to be heard in which the HCJ held that by virtue of s. 59 of the Immigration Act 1959/63 ('the Immigration Act'), the

appellant was not entitled to such right. Hence, the present appeal. The issues that arose for determination, *inter alia*, were (i) whether the appellant had a guaranteed right or legitimate expectation to travel abroad as he was a holder of a valid passport; (ii) whether the first respondent had made its decision, without any power under any law depriving the appellant of his guaranteed right under arts. 5 and 8 of the Federal Constitution; without according to the appellant the opportunity to be heard; in breach of his legitimate expectation to travel and without assigning any reasons; (iii) whether the respondents failed to state the source of power in coming to the decision and that there was no provision in law which allowed the first respondent to bar the appellant from leaving Malaysia; and (iv) whether the decision of the first respondent was reviewable in view of s. 59A of the Immigration Act.

Held (dismissing appeal with costs)
Per Idrus Harun JCA delivering the judgment of the court:

(1) By virtue of s. 3(2) of the Immigration Act, the first respondent had the necessary power to bar the appellant from leaving Malaysia. Section 3(2) of the Immigration Act is couched in broader terms as to vest powers in the first respondent to have the general supervision and direction of all matters relating to immigration throughout Malaysia. (para 12)

(2) The decision to impose a ban on the appellant from going abroad for the reason that he was under police investigation related to immigration matters under the Immigration Act. The words and direction to all matters relating to immigration in s. 3(2) are readily capable of being construed to include a decision barring the appellant on appropriate grounds from leaving the country. Therefore, the contention that the first respondent had acted without jurisdiction was completely untenable. (para 12)

(3) The effect of the ouster provision as provided in s. 59A has excluded judicial review of the act of the first respondent in making the impugned decision, by stripping the court of its supervisory judicial function. Parliament, having excluded judicial review under Immigration Act, it is not permissible for the court to intervene and disturb a statutorily unreviewable decision. (para 14)

(4) The judicial approach adopted by the Federal Court in *Loh Wai Kong* shows that the expression 'personal liberty' viewed from the context in which they appear in art. 5 embodies the constitutional protection in relation to personal liberty in that it only guarantees freedom from arrest or detention the deprivation of which is valid if it is effected in accordance with the law. Hence, by reason of its clear provisions, art. 5 does not require an expansive or uninhibited interpretation and does not import, and in fact excludes, any other rights such as the guaranteed right to a passport or right of travel. (para 21)

(5) The Malaysian passport remains the property of the second respondent which may be withdrawn at any time. Any issuance of a Malaysian passport only carries with it a privilege and not a right, to travel overseas. It is a privilege given by the Government subject to the respondents' discretion whether or not under certain appropriate circumstances, to allow or bar a person from leaving the country, for instance, if criminal investigation is pending against him. This privilege, is not an integral part of the right embodied in art. 5(1). In the circumstances, given the fact that the appellant was being investigated under s. 124B of the Penal Code, this would constitute a valid and legitimate reason to deny the appellant such privilege. The impugned decision, in any event, can scarcely be said or is not intended to be a perpetual or permanent bar so that the appellant will be completely deprived of the privilege. It is merely a decision in order to facilitate the investigation by the police. Even if such privilege is a guaranteed right under the Constitution, no rights as enshrined in the constitution are absolute for such rights are accorded subject to some permissible restrictions or restraints decreed by it. (para 22)

(6) There was no such promise or representation made by the respondents that even with a valid passport, the appellant would not be barred from leaving the country for a valid reason. Further, there is an express term in the passport that the passport is the property of the second respondent which may be withdrawn at any time. (para 39)

(7) In exercising the powers under the Immigration Act, the first respondent shall have the general supervision and direction of all matters relating to immigration throughout Malaysia. There is no express or implied duty under the Immigration Act imposed on the first respondent to state reasons for his decision to the appellant. (para 40)

(8) In the present case, the appellant was one of the persons under investigation by the police for an offence allegedly committed under s. 124B of the Penal Code. The first respondent was not obliged or under a duty to inform the appellant that he was being investigated by the police and therefore was restricted from leaving the country. Police investigation is confidential and has restriction on its disclosure. Thus, the first respondent was not duty bound and could not be expected to provide reasons for his decision where the facts and the law are very clear, it could not be any breach of duty where none exists in law. The respondents could not be said to have deprived the appellant of any procedural fairness. (para 41)

(9) All the questions raised by the appellant lacked merit and it was not necessary to interfere with the decision of the judge in refusing to declare the impugned decision of the first respondent as void and an order of *certiorari* to quash the same as well as special damages. (para 44)

Bahasa Malaysia *Headnotes*

Perayu merupakan pemegang pasport Malaysia yang sah dengan tarikh tamat tempoh pada 23 April 2020. Pada 22 Julai 2015, perayu bercadang untuk ke Yogyakarta, Indonesia. Semasa di lapangan terbang, perayu mendakwa bahawa seorang pegawai imigresen memaklumkan padanya bahawa dia diarahkan oleh pegawai atasannya untuk tidak membenarkan perayu ke luar negara kerana dia disiasat di bawah s. 124B Kanun Keseksaan. Perayu, oleh itu, pada 19 Ogos 2015, memfailkan kebenaran untuk memulakan prosiding semakan kehakiman terhadap responden menurut A. 53 kk. 2 dan 3 Kaedah-Kaedah Mahkamah 2012 dan memohon, antara lain, satu deklarasi bahawa perintah responden pertama menghalang perayu meninggalkan negara pada 22 Julai 2015 bertentangan dengan undang-undang dan dengan itu tidak sah. Hakim Mahkamah Tinggi ('HMT') berpendapat bahawa perayu tidak mempunyai hak perlembagaan untuk ke luar negeri dan larangan perjalanan itu selaras dengan undang-undang. Berdasarkan hujahan perayu bahawa dia mempunyai jangkaan sah untuk melakukan perjalanan ke luar negara kerana pada masa yang material perayu adalah pemegang pasport Malaysia yang sah, HMT menekankan bahawa responden tidak menjanjikan atau memberikan representasi kepada perayu bahawa dengan pasport yang sah perayu mempunyai hak untuk ke luar negara. Oleh itu, tidak ada jangkaan sah bagi perayu untuk melakukan perjalanan ke luar negara. Hakim Mahkamah Tinggi juga menangani isu pengecualian hak untuk didengar di mana HMT berpendapat bahawa berdasarkan s. 59 Akta Imigresen 1959/63 ('Akta Imigresen'), perayu tidak berhak atas hak tersebut. Oleh itu, rayuan ini. Isu-isu yang timbul untuk penentuan, antara lain, adalah (i) sama ada perayu mempunyai hak yang dijamin atau jangkaan sah untuk ke luar negara kerana dia pemegang pasport yang sah; (ii) sama ada responden pertama membuat keputusannya, tanpa sebarang kuasa di bawah mana-mana undang-undang yang menindas hak perayu yang dijamin bawah per. 5 dan 8 Perlembagaan Persekutuan; tanpa memberi perayu peluang untuk didengar; kerana melanggar jangkaan sah untuk ke luar negara dan tanpa memberikan apa-apa sebab; (iii) sama ada responden gagal menyatakan sumber kuasa dalam membuat keputusan dan tidak ada peruntukan dalam undang-undang yang membenarkan responden pertama menahan perayu meninggalkan Malaysia; dan (iv) sama ada keputusan responden pertama boleh dikaji semula berdasarkan s. 59A Akta Imigresen.

Diputuskan (menolak rayuan dengan kos)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan s. 3(2) Akta Imigresen, responden pertama mempunyai kuasa yang diperlukan untuk menghalang perayu daripada meninggalkan Malaysia. Seksyen 3(2) Akta Imigresen dibentangkan dalam istilah yang lebih luas yang memberikan kuasa pada responden pertama untuk pengawasan am dan arahan semua perkara yang berkaitan dengan imigresen di seluruh Malaysia.

(2) Keputusan untuk mengenakan larangan atas perayu daripada ke luar negara atas alasan berada bawah siasatan polis berkaitan dengan isu imigresen di bawah Akta Imigresen. Perkataan dan arahan untuk semua perkara yang berhubungan dengan imigresen dalam s. 3(2) boleh ditafsirkan untuk merangkumi keputusan menghalang perayu atas alasan sesuai dari meninggalkan negara. Oleh itu, hujahan bahawa responden pertama telah bertindak tanpa bidang kuasa tidak dapat dipertahankan.

(3) Kesan peruntukan penyingkiran seperti yang terkandung dalam s. 59A telah mengecualikan semakan kehakiman tindakan responden pertama dalam membuat keputusan yang dipersoalkan, dengan mengakas kuasa mahkamah dalam menjalankan penyeliaannya kehakiman. Parlimen dengan mengecualikan semakan kehakiman di bawah Akta Imigresen, tidak dibenarkan oleh mahkamah untuk campur tangan dan mengganggu keputusan yang tidak boleh disemak semula.

(4) Pendekatan kehakiman yang diguna pakai oleh Mahkamah Persekutuan di *Loh Wai Kong* menunjukkan bahawa ungkapan 'kebebasan peribadi' dilihat berdasarkan konteks yang timbul dalam per. 5 merangkumi perlindungan perlembagaan berkaitan dengan kebebasan peribadi kerana ini hanya menjamin kebebasan daripada penahanan penafian yang sah jika dilaksanakan menurut undang-undang. Oleh itu, atas peruntukannya yang jelas, per. 5 tidak memerlukan pentafsiran yang luas dan tidak mengimport, tetapi mengecualikan sebarang hak lain seperti, memberikan perayu, hak yang dijamin untuk pasport atau hak perjalanan.

(5) Pasport Malaysia tetap menjadi milik responden kedua yang boleh ditarik balik pada bila-bila masa. Apa-apa pengeluaran pasport Malaysia hanya membawa keistimewaan dan bukan hak untuk perjalanan ke luar negara. Ini satu keistimewaan yang diberikan oleh Kerajaan tertakluk pada budi bicara responden sama ada atau tidak berdasarkan keadaan tertentu untuk membenarkan atau menghalang seseorang daripada meninggalkan negara, misalnya, jika siasatan jenayah sedang dilakukan terhadapnya. Keistimewaan ini bukanlah sebahagian hak yang terkandung dalam per. 5(1). Dalam keadaan ini, oleh kerana perayu sedang disiasat bawah s. 124B Kanun Keseksaan, ini alasan sah untuk menafikan hak istimewa perayu. Keputusan yang dijatuhkan, dalam apa

jua keadaan, tidak dimaksudkan untuk menjadi penghalangan kekal atau tetap iaitu perayu akan dilucutkan hak istimewa secara sepenuhnya. Ini hanya satu keputusan untuk memudahkan siasatan polis. Sekalipun keistimewaan itu adalah hak yang terjamin bawah Perlembagaan sebagaimana yang dikemukakan oleh perayu, tiada hak sebagaimana yang termaktub dalam Perlembagaan adalah mutlak untuk hak-hak tersebut diberikan tertakluk pada sekatan yang dibenarkan olehnya.

(6) Tiada janji atau representasi dibuat oleh responden bahawa walaupun dengan pasport yang sah, perayu tidak akan dihalang daripada meninggalkan negara ini atas alasan yang sah. Tambahan pula, terdapat istilah nyata dalam pasport bahawa pasport adalah hak milik responden kedua yang boleh ditarik balik pada bila-bila masa.

(7) Dalam menjalankan kuasa bawah Akta Imigresen, responden pertama mempunyai pengawasan am dan arahan semua perkara yang berkaitan dengan imigresen di seluruh Malaysia. Tiada duti tegas atau tersirat bawah Akta Imigresen yang dikenakan ke atas responden pertama untuk menyatakan alasan keputusannya kepada perayu.

(8) Dalam kes ini, perayu salah seorang yang disiasat oleh polis atas kesalahan yang didakwa dilakukan bawah s. 124B Kanun Keseksaan. Responden pertama tidak diwajibkan atau bawah kewajipan untuk memaklumkan kepada perayu bahawa dia sedang disiasat oleh polis dan oleh itu dihalang daripada meninggalkan negara. Siasatan polis adalah rahsia dan mempunyai sekatan terhadap pendedahannya. Justeru, responden pertama tidak wajib dan tidak boleh dijangka memberikan alasan untuk keputusannya di mana fakta dan undang-undang sangat jelas, tidak boleh berlaku apa-apa pelanggaran kewajipan yang tidak ada dalam undang-undang. Responden tidak boleh dikatakan menafikan prosedur keadilan kepada perayu.

(9) Semua soalan yang dibangkitkan oleh perayu tidak mempunyai merit dan tidak diperlukan untuk mengganggu keputusan hakim dalam menolak mengisytiharkan keputusan yang dijatuhkan oleh responden pertama sebagai tidak sah dan perintah *certiorari* untuk membatalkan yang sama dan ganti rugi khas.

Case(s) referred to:

Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 3 CLJ 643 FC ***(refd)***

AK Gopalan v. The State of Madras AIR 1950 27 ***(refd)***

Anisminic v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 FC ***(refd)***

Government of Malaysia & Anor v. Selangor Pilot Association [1977] 1 LNS 28 PC ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 4 CLJ 12 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Maneka Gandhi v. Union of India AIR 1978 SC 597 ***(refd)***
Marta Stefan v. General Medical Council [1999] 1 WLR 1293 ***(refd)***
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***
Ong Ah Chuan v. PP & Another Case [1980] 1 LNS 181 PC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Lau Kee Hoo [1983] 1 CLJ 21; [1983] CLJ (Rep) 336 FC ***(refd)***
PP v. Yee Kim Seng [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 HC ***(refd)***
PP v. Yuneswaran Ramaraj [2015] 9 CLJ 873 CA ***(refd)***
Pyx Granite Co Ltd v. Ministry of Housing and Local Government and Others [1960] AC 260 ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Sambhu Nath Sarkar v. The State of West Bengal AIR 1973 SC 1425 ***(refd)***
Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:
Administration of Islamic Law (Federal Territories) Act 1993, s. 59(1)
Civil Law Act 1956, s. 3(1)
Courts of Judicature Act 1964, s. 25(2), Schedule para 1
Federal Constitution, arts. 5(1), (2), (3), (4), (5), 8(1), 9, 13(1), 74(1), 160(1)
Immigration Act 1959/63, ss. 3(2), 59, 59A, 65(1)(c)
Interpretation Acts 1948 and 1967, s. 17A
Peguam Syarie Rules 1993, r. 10
Penal Code, s. 124B
Rules of Court 2012, O. 41 r. 5, O. 53 rr. 2(3), 3(1)

The Constitution of India [Ind], arts. 20, 21, 22(1), (2), (3)
Constitution of the Republic of Singapore [Sing], art. 9(1)

For the appellant - Gobind Singh Deo & Joanne Chua; M/s Gobind Singh Deo & Co
For the respondent - Shamsul Bolhassan & Mohamad Rizal Fadzil; SFCs

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-241-08-2014 (affirmed).]

Reported by Sandra Gabriel

A

JUDGMENT

Idrus Harun JCA:

[1] This appeal concerns an order made by the first respondent in which the appellant was barred from leaving the country on 22 July 2015. The facts
B emerging out of the events culminating in the said order appear sufficiently on the face of the pleadings. These facts, no doubt, are simple, yet it raises constitutional issues of some importance relating to fundamental liberties calling upon us for our determination. To the extent that they are central to the appeal, we would mention that the appellant, a Member of Parliament
C for Petaling Jaya Utara, at the material time, was a holder of a valid Malaysian passport bearing number A34010087 with an expiry date of 23 April 2020. On 22 July 2015, the appellant attended at the Kuala Lumpur International Airport 2 to take Air Asia Flight AK 348 at 3.15pm bound for Yogyakarta, Indonesia. Whilst at the airport, the appellant alleged, an immigration officer informed him that he had been directed by his superior
D not to allow the appellant to travel abroad. On 24 July 2015, the appellant, through his solicitors, wrote to the first respondent to confirm the above and to demand an explanation but he waited in vain for a response.

[2] The appellant consequently, on 19 August 2015, filed for leave to
E commence judicial review proceedings against the respondents pursuant to O. 53 rr. 2 and 3 of the Rules of Court 2012 seeking:

(a) a declaration that the order by the first respondent barring the appellant from leaving the country on 22 July 2015 is against the law and thus is invalid and void;

F (b) an order of *certiorari* to remove into the court for the purpose of it being quashed immediately the said decision; and

(c) special damages, costs and any further relief as the court deems appropriate and reasonable.

G The application is supported by an affidavit deposed by the appellant on 19 August 2015. The first stage of the judicial review procedure under O. 53 r. 3(1) of the Rules of Court 2012 had been complied with when leave was granted by the High Court on 1 October 2015. Thereafter, the respondents filed their affidavit in reply affirmed by the first respondent on 15 January
H 2016. The hearing of the appellant's substantive application for judicial review at the second stage of the judicial review procedure ended with a dismissal of the said application by the High Court on 27 July 2016. The appeal before us is brought by the appellant against the said High Court's decision in dismissing his application.

I **[3]** We shall now refer to the decision of the learned judge in the court below which deals with the question whether the appellant has a guaranteed right or legitimate expectation to travel abroad as he is a holder of a valid passport, and the issues relating to the exclusion of right to be heard and

jurisdiction of the respondents in issuing the order to bar the appellant from leaving Malaysia. In summary, the learned judge held that the appellant had no constitutional rights to travel overseas and that the travel ban was in accordance with the law. On the appellant's contention that he had legitimate expectation of being able to travel abroad as at all material times he was a holder of a valid Malaysian passport, the learned judge emphasised that the respondents did not promise or represent to the appellant that with a valid passport he had a right to travel abroad. As such, there was no legitimate expectation for the appellant to travel abroad. The learned judge had also dealt with the issue of the exclusion of right to be heard in which Her Ladyship held that by virtue of s. 59 of the Immigration Act 1959/63 (Act 155), the appellant was not entitled to such right. It was also submitted for the appellant that the first respondent was bereft of any power under Act 155 to bar the appellant from leaving the country. The learned judge however found that by virtue of s. 3(2) of Act 155, the first respondent had the power to prevent the appellant from travelling abroad.

[4] This appeal raises several main issues in the memorandum of appeal. But the appellant's case that lay at the core of the appeal before us is directed on the arguments that the first respondent had made his decision, without any power under any law depriving the appellant of his guaranteed right under arts. 5 and 8 of the Federal Constitution; without according to the appellant the opportunity to be heard; in breach of his legitimate expectation to travel and without assigning any reasons. The appeal also turns on the contentions that the first respondent, as a public decision-maker, acted under dictation, in mechanical manner and unreasonably.

[5] There can be little doubt that the case before us involves an exercise of the additional powers of the High Court under the Courts of Judicature Act 1964 (Act 91). It is clear in s. 25(2) of Act 91 that the power to issue to any person or authority writs or orders of the nature of *certiorari* is one of the additional powers vested in the High Court set out in para. 1 of the Schedule thereto. The relevant statutory provisions which govern the procedure relating to the exercise of these additional powers are found in O. 53 of the Rules of Court 2012 which requires any relief specified in para. 1 of the Schedule to be sought by way of an application for judicial review. It is a well-established principle in our law that by this application, a challenge is made to the way in or process by which a decision has been made. Any such challenge is not really concerned with the conclusion of that process and whether it is right as long as the right procedures have been followed. Following the Federal Court's decision in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, the court is now permitted on the grounds of illegality, irrationality and possibly proportionality to scrutinise such decision not only for process, but also for substance. However, the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel*

Excelsior (M) Sdn Bhd [2010] 8 CLJ 629; [2010] 6 MLJ 1 added a rider to the position it had adopted in its majority decision in *R Rama Chandran* when it stated that there might be cases in which, for reasons of public policy, national interest, public safety or national security, it might be wholly inappropriate for the reviewing court to attempt any substitution of views on substance or be amenable to the *Rama Chandran* application. It is also a principle which remains a good and trite law that an order of *certiorari* is always at the discretion of the court and it ought not to be issued to quash a decision which has already been made by a public authority unless upon subjecting such decision to anxious scrutiny, there is shown a clear lack of jurisdiction, a blatant failure to perform some statutory duty, a serious breach of principles of natural justice or an error of law on the face of such decision (*Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110). Additionally, by virtue of O. 53 r. 2(3) of the Rules of Court 2012, any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function is entitled to make the application for judicial review. Thus, based on these provisions and the principles of law on judicial review as earlier stated, for a decision to be quashed on judicial review or susceptible to the court's reviewing powers, there must first be a decision by a decision-maker, and that decision must affect the aggrieved party adversely under the circumstances outlined above when it is so made. It is only where these are established, the appellant can be said to have the necessary *locus standi* to file this application and the impugned decision of the respondents is susceptible or can be subjected to judicial review by the reviewing court.

[6] The appellant adduces irrefragable evidence against any dispute that the impugned decision was indeed made by the first respondent. However, the appellant would have to show that he was adversely affected by the decision before he could make the application and bring it within the bounds of O. 53 r. 2(3) of the Rules of Court 2012. That is the single test of threshold *locus standi* for all the remedies including the order of *certiorari* available under O. 53 of the Rules of Court 2012. Therefore, when this court deals with the present application, it is imperative that the appellant has to show that he has the requisite *locus standi* to file this application. We have been referred to the case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164 in which this court, in dealing with the test of threshold *locus standi*, at p. 541 (CLJ); pp. 171 and 172 (MLJ) held:

> [16] It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. There is a single test of threshold *locus standi* for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the

> action impugned (see *Finlay v. Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing: See, for example *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

[7] The Federal Court in the case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 preferred the 'adversely affected' test formulated by the Court of Appeal in *QSR Brands Bhd*, *supra*, as a single test for all the remedies provided for under O. 53 of the Rules of Court 2012 in determining whether an applicant has *locus standi* in an application for judicial review. Hasan Lah FCJ on this issue had this to say at p. 549 (CLJ); pp. 163-164 (MLJ):

> ... In our view for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.

[8] We are satisfied that the appellant has the necessary *locus standi* to commence the instant action by way of judicial review as he is adversely affected by the first respondent's decision in not allowing him from going abroad.

[9] Having rendered the law upon the subject and found that there was a decision made by the first respondent and that the appellant has the requisite *locus standi* to file this application, we shall commence to consider whether the decision of the first respondent falls within the circumstances we have alluded briefly earlier when we deal with the principles of law governing an exercise of discretion by the public authority in making a decision or as learned counsel for the appellant had candidly put it, has its provenance in a jurisdictional error. The position adopted for the appellant in this appeal is clearly described by his counsel in his written and oral submissions which brings in sharp focus the contentions that the respondents' decision is amenable to judicial review as such decision is *ultra vires* the powers of the respondents or an abuse of discretion, unreasonable, in breach of the rules of natural justice where the appellant had not been given notice of it nor any opportunity to be heard before the decision was made and lastly, in breach of the appellant's expectation to travel.

[10] We would, in dealing with the appellant's submission, begin by observing that the learned judge had determined that the appellant had no constitutional rights to travel overseas and that the travel ban was in accordance with the law. With this observation, we now quote the relevant s. 59A of Act 155:

> 59A(1). **There shall be no judicial review in any court of any act done or any decision made** by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act

except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, "judicial review" includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of *mandamus*, prohibition and ***certiorari***;

(b) an application for a **declaration** or an injunction;

(c) any writ of *habeas corpus*; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act. (emphasis added)

These provisions are crystal clear. It deals with exclusion of judicial review, which includes prerogative order of *certiorari*, in any court of any act or any decision made by the Director General of Immigration or the Minister. The section, however, provides a single instance where such act or decision is susceptible to judicial review and that instance is where it involves any question relating to compliance with any procedural requirement of Act 155 or the regulations governing that act or decision. In the absence of any such non-compliance with procedural requirement, it is patent that the exclusion of judicial review is exclusive and the court is precluded from reviewing any decision which the law in Act 155 has mandated to be irreviewable.

[11] However, the point in the contention of the appellant is that the respondents fail to state the source of power in coming to the decision and that there is no provision in law which allows the first respondent to bar the appellant from leaving Malaysia. Learned counsel contended that the term 'procedural requirements' includes jurisdictional requirements citing in support thereof the case of *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 which held that 'if Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists.' The ouster clause in s. 59A therefore does not apply as the decision of the first respondent is not within the jurisdiction of Act 155 and the first respondent consequently could not have exercised his powers thereunder.

[12] It is enough, when dealing with this contention, to say that by virtue of s. 3(2) of Act 155, the first respondent has the necessary power to bar the appellant from leaving Malaysia. Section 3(2) of Act 155 is couched in broader terms as to vest powers in the first respondent to have the general supervision and direction of all matters relating to immigration throughout Malaysia. For convenience, we quote s. 3(2) of Act 155 below:

3.(2) The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.

It seems to us, there can be little doubt that the decision to impose a ban on the appellant from going abroad for the reason that he is under police investigation surely relates to immigration matters under Act 155. We agree with the learned judge that the words "and direction to all matters relating to immigration" in s. 3(2) are readily capable of being construed to include a decision barring the appellant on appropriate ground from leaving the country. Therefore, when this court is called upon to determine the validity of the impugned decision, we are satisfied that the attempt by the appellant to persuade us to hold that the first respondent has acted without jurisdiction is completely untenable.

[13] Now, reverting to s. 59A of Act 155, on the facts of the present case, the appellant is seeking to review the decision of the first respondent to restrict or bar the appellant from travelling abroad as he is being investigated under s. 124B of the Penal Code. The question that has emerged is whether such decision is reviewable in view of s. 59A. The trite principle is that the subject's recourse to the court for the determination of his rights is not to be excluded unless by clear words (*Pyx Granite Co Ltd v. Ministry of Housing and Local Government and Others* [1960] AC 260 as cited by the Federal Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105. The Federal Court in *Sugumar*, *supra,* had construed s. 59A of Act 155 and held at pp. 125 and 126 as follows:

> Thus, it is clear from the explanatory statement that the intention of Parliament in amending s. 59A by providing new provisions is to exclude judicial review by the court of any act done or any decision of the Minister or the Director General or the State Authority under the Act except on grounds of procedural non-compliance of the Act or regulations governing the act or decision ....
>
> ... the language in the present s. 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the Minister, Director General or the State Authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para. (2) of s. 59A. *By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act*. (emphasis added)

[14] Thus, the effect of the ouster provision as provided in s. 59A has excluded judicial review of the act of the first respondent in making the impugned decision, by stripping the court of its supervisory judicial function. Parliament having excluded judicial review under Act 155, it is not permissible for the court to intervene and disturb a statutorily unreviewable decision (*Sugumar*).

[15] Next, we will endeavour to consider the appellant's contention that he has a guaranteed right to travel abroad under arts. 5(1) and 8(1) of the Federal Constitution. We were pressed, on this point, with the argument that the Federal Court's decision in *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22; [1979] 2 MLJ 33 is not binding on this court. The learned judge in considering this application before she, followed the decision of the above case and decided that the appellant had no constitutional right to travel overseas. In *Loh Wai Kong*, *supra*, the respondent had applied for an order directing the appellants to issue a Malaysian passport to him. The respondent contended that he had a fundamental right to travel abroad and the refusal of a passport violated this right. Three issues were taken in the course of the arguments advanced by the appellant on fundamental right and these were, whether a citizen has a right to leave the country, to travel overseas, and a right to a passport? Suffian LP delivered the judgment of the Federal Court comprising five judges and we produce the extracts of the relevant passages of His Lordship's lucid pronouncement:

> Article 5(1) speaks of personal liberty, not of liberty *simpliciter*. Does personal liberty include the three liberties? It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In light of this principle, in construing "personal liberty" in article 5(1) *one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority*. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in article 9 which, however, only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein. With respect, we agree with what Mukherjee J said at page 96 in *Gopalan*:
>
> > *In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: vide Dicey on Constitutional Law, Edition 9, pages 207, 208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty*.

> While the constitution by article 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, *it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, in our judgment, the citizen has no constitutional right to leave the country and travel overseas*. Indeed, as to the latter how can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a fundamental right which every foreign country may lawfully reject.
>
> Does our citizen have a fundamental right to leave the country with or without passport? In our judgment no such right is guaranteed by the constitution and ... in certain circumstances the Government has power to stop a citizen ... from leaving: certainly when, as in this case, there is a criminal charge pending against him.
>
> ...
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> ...
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> ...
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> **To sum up, "personal liberty" in article 5 means liberty relating to or concerning the person or body of the individual; that article does not confer on the citizen a fundamental right to leave the country**. On the contrary, the Government may stop a person from leaving the country if, for instance, there are criminal charges pending against him.
>
> *Article 5 does not confer on the citizen a fundamental right to travel overseas. Article 5 does not confer on the citizen a right to a passport. The Government has a discretion whether or not to issue, delay the issue of or withdraw a passport*: for instance, if criminal charges are pending against the applicant. The exercise of this discretionary power is subject to review by a Court of law. (emphasis added)

[16] In his submission, learned counsel for the appellant argued that the case of *Loh Wai Kong* was distinguishable from our present case. In *Loh Wai Kong*, the respondent was charged in court with criminal offences where his passport was surrendered to court as a condition of bail. His passport expired and was returned to him on his request. When he applied to have his passport renewed, the Immigration Department refused to have it renewed because he had criminal charges pending in court. The appellant in the present case had at all material times, a valid passport and as such, legitimate expectation of being able to travel. So the question in this case really is premised on the right to travel where one has a valid passport. Further, the appellant here has not been charged in court for any offence. If at all, *Loh Wai Kong* supports the appellant as it clearly states that even in a situation where an application for a passport is refused, that is a discretion which "is subject to review by a court of law," as in the case of other discretionary powers.

[17] In any event, learned counsel submitted, *Loh Wai Kong* is no longer good law in view of a subsequent decision by the Federal Court sitting with three judges in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301. Gopal Sri Ram FCJ there commented on the expression 'personal liberty' in art. 5(1) of the Federal Constitution:

> [7] ... And as for the decision in *Loh Wai Kong*, it was a case which the Government of Malaysia succeeded before the High Court. Nevertheless, it purported to appeal against certain observations made by Gunn Chit Tuan J (later Chief Justice of Malaya) in the course of his judgment. As the law then stood and indeed as it still stands even today, a litigant who has succeeded at first instance has no right to appeal against a decision given wholly in his or her favour. See *Lake v. Lake* [1955] P 336. The former Federal Court therefore had no jurisdiction to hear the matter. Yet it entertained the appeal and purported to allow it when the final order of the High Court was in the appellant's favour. Hence, the views expressed in *Loh Wai Kong* are worthless as precedent.
>
> [14] When art. 5(1) is read prismatically and in the light of art. 8(1), the concepts of 'life' and 'personal liberty' housed in the former are found to contain in them other rights. Thus, 'life' means more than mere animal existence and includes such rights as livelihood and the quality of life (see *Tan Tek Seng*'s case). **And 'personal liberty' includes other rights such as the right to travel abroad**. See *Loh Wai Kong v. Government of Malaysia* [1978] 2 MLJ 175, where Gunn Chit Tuan J said that *'personal liberty' includes "liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires."* (emphasis added)

Based on the above decision, a submission was made by the appellant to persuade us to hold that this court, in interpreting arts. 5 and 8 of the Federal Constitution that guarantees fairness in all administrative actions must do so in a liberal and generous manner. The appellant's right to leave Malaysia is a fundamental liberty guaranteed under both articles of the Federal Constitution. Therefore, the appellant submits, it follows that the respondents' decision is an infringement of his fundamental rights guaranteed by the said arts. 5 and 8 of the Federal Constitution.

[18] In light of the above submission before this court, obviously an important point was taken on fundamental rights guaranteed under the Federal Constitution. To be specific, the argument by learned counsel turns upon the interpretation of art. 5 of the Federal Constitution and his reasoning assumes, as we understand it, that the expression 'personal liberty' includes the appellant's right to travel abroad. Before proceeding further, it is necessary to set out art. 5 of the Federal Constitution in full:

> Liberty of the person
>
> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

(5) Clauses (3) and (4) do not apply to an enemy alien.

[19] The Federal Court in *Loh Wai Kong* considered the question whether a citizen like the appellant had a right to leave the country, to travel overseas, and a right to a passport. Suffian LP, in construing the words "personal liberty" in art. 5, explained in very clear terms that the rights guaranteed under this article did not include the right to travel overseas and to a passport. Thus, the rights as carefully circumscribed in art. 5 are confined to all rights relating to the person or body of the individual. This interpretation has found favour in the Federal Court's decision in *Sugumar*'s case, *supra* and this is what Mohd Dzaiddin FCJ, delivering the judgment of the court said at p. 137:

In our view, the words 'personal liberty' should be given the meaning in the context of art. 5 as a whole. In this respect, we adopt what had been said by Suffian LP in *Loh Wai Kong* ...

The Federal Court in the above case had also endorsed the following words of Suffian LP, which appears at p. 137:

... In light of this principle, in construing 'personal liberty' in art 5 one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except

> enemy alien, freedom from being 'unlawfully detained, ... It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport ...

[20] On the other hand, Mohd Dzaiddin FCJ there disagreed with the Court of Appeal's decision in *Sugumar* that the words 'personal liberty' should be generously interpreted in the way it did when interpreting the expression 'life' in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. In other words, the Federal Court disagreed that the expression personal liberty should be construed to include all other rights including all those facets that are an integral part of life itself and those matters which go to form the quality of life concluding the deliberation on this issue with the following words:

> We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Constitution under 'FUNDAMENTAL LIBERTIES' *viz*, protection on against retrospective criminal laws and repeated trials (art. 7); equality (art. 8); freedom of speech, assembly and association (art. 10); freedom of religion (art. 11); rights in respect of education (art. 12) and rights to property (art. 13).

[21] We may venture to say in deferential terms that for our part, this court will not take an unfavourable stance to downplay the constitutional significance of the Federal Court's pronouncement in *Loh Wai Kong* by dismissing it as views which "are worthless as precedent". The judicial approach adopted by the Federal Court in *Loh Wai Kong* shows that the expression 'personal liberty' viewed from the context in which they appear in art. 5 embodies the constitutional protection in relation to personal liberty in that it only guarantees freedom from arrest or detention the deprivation of which is valid if it is effected in accordance with law. Hence, by reason of its clear provisions, art. 5 does not require an expansive or uninhibited interpretation and in our judgment it certainly does not import, and in fact excludes, any other rights such as, to quote the appellant, the guaranteed right to a passport or right of travel.

[22] Freedom of movement is guaranteed in art. 9, however such freedom, as pointed out by the Federal Court in *Loh Wai Kong*, only guarantees the citizen to enter Malaysia and to move freely within the Federation and to reside anywhere therein, subject to restrictions as Parliament may by law impose. The Constitution is silent as to the citizen's right to travel overseas and accordingly, the Federal Court there decided, the citizen had no constitutional right to travel to foreign countries. It does not seem to be realised that the Malaysian passport remains the property of the second respondent which may be withdrawn at any time. This is very clearly stated at the last page of the passport (see exh. "PKW1"). With all these conditions accompanying the issuance of the passport, we would be more inclined to say that at the most, any issuance of a Malaysian passport only carries with it

a privilege and not a right, to travel overseas. It is a privilege given by the Government subject to the respondents' discretion whether or not under certain appropriate circumstances, to allow or bar a person from leaving the country, for instance, if criminal investigation is pending against him. This privilege we apprehend, is not an integral part of the right embodied in art. 5(1). Surely, we would say, in the circumstances of the present case, given the fact that the appellant was being investigated under s. 124B of the Penal Code, this established fact would constitute a valid and legitimate reason to deny the appellant such privilege. The impugned decision, in any event, can scarcely be said or is not intended to be a perpetual or permanent bar so that the appellant will be completely deprived of the privilege. It is merely a decision in order to facilitate the investigation by the police. The fact that the appellant's passport has not been withdrawn clearly supports our finding that the ban is not perpetual. Even if such privilege is a guaranteed right under the Constitution as submitted by the appellant, we would hold with very little hesitation that no rights as enshrined in our Constitution are absolute for such rights are accorded subject to some permissible restrictions or restraints decreed by it.

[23] *Loh Wai Kong* settled the question of interpretation of the expression 'personal liberty' in art. 5(1) and its manifest authority is distinguished by the judicial calmness and acceptance of its views. It held the field for three decades. In 2009, the Federal Court in *Lee Kwan Woh*, dismissed the views expressed in *Loh Wai Kong* to be worthless as precedent when it approved the High Court's judgment in *Loh Wai Kong* that 'personal liberty' included other rights such as the right to travel abroad and that it included liberty to a person not only in the sense of being incarcerated or restricted to live in any portion of the country but also included the right to cross the frontiers in order to enter or leave the country when one so desired. Learned counsel, citing the Federal Court's decision in the case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, reminds us that when two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision. Thus, since *Lee Kwan Woh* was a later decision, learned counsel submits, it prevails over the decision in *Loh Wai Kong*, hence, we should accept that decision as binding upon this court.

[24] Learned Senior Federal Counsel draws our attention to the recent decision of the Federal Court in the case of *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 4 CLJ 12; [2016] 2 MLJ 309 which held that r. 10 of the Peguam Syarie Rules 1993, mandating that only Muslims could be admitted as peguam syarie, did not contravene art. 5 of the Federal Constitution. The Federal Court, by a majority decision, in the judgment of Raus Sharif PCA (now the Chief Justice of the Federal Court) also held that r. 10 of the Rules was not *ultra vires* s. 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993.

A However, the dissenting judgment of Suriyadi FCJ decided otherwise when it held that r. 10 of the Rules was inconsistent with s. 59 and was thus *ultra vires* the parent Act. Nevertheless, inasmuch as it concerned art. 5, the dissenting judgment of the Federal Court was clearly in sync with the majority decision when Suriyadi FCJ held that the issue of livelihood in the B respondent being denied admission as peguam syarie fell outside the ambit of art. 5. Accordingly, we hold that this decision, being a later decision is binding on this court. Suriyadi FCJ discussed art. 5 and concluded by adopting the approach of Suffian LP in *Loh Wai Kong*. We reproduce from the case the relevant passages of His Lordship's reasoning:

C [140] I now discuss art. 5. Under this article no person shall be deprived of his life or personal liberty save in accordance with law.

[141] The Court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 adopted a broad approach to the definition of 'life' legislated in art. 5(1). For brevity, I find no necessity in D reproducing the reasoning behind that broad approach. Suffice if I regurgitate what the court said through Gopal Sri Ram JCA:

> … the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these E are the rights to seek and be engaged in lawful and gainful employment …

[142] The effect of the above approach (though in relation to the definition of 'life' and which regretfully failed to discuss the earlier case of *Government of Malaysia & Ors v. Loh Wai Kong*) is that under art. 5 the respondent is guaranteed of her fundamental right to livelihood; she is F not to be deprived of her livelihood by a negative or restrictive provision. Needless to say r. 10 in its current format, which negatives and restricts her rights, and acquiescing to Gopal Sri Ram's JCA point of view, would invariably infringe the respondent's constitutional rights.

[143] Lord Suffian LP, on the other hand, in *Government of Malaysia & Ors* G *v. Loh Wai Kong* [1979] 2 MLJ 33, when discussing the issue at hand, stated that art. 5 speaks of personal liberty and not of liberty *simpliciter*. This article only relates to the person or body of the individual. Personal liberty was held not to include certain rights, like right of travel or right to passport. The respondent there had argued that the refusal or delay in granting him a passport violated his right of personal liberty under H art. 5.

[144] In the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 3 MLJ 72, this court had occasion to state:

> In our view, the words 'personal liberty' should be given the meaning in the context of art 5 as a whole. In this respect, we I adopt what has been said by Suffian LP in *Loh Wai Kong* …

[145] Mohamed Dzaiddin FCJ in the above case also endorsed the following words of Suffian LP, which read:

> ... In light of this principle, in construing 'personal liberty' in art 5 one must look at the other clauses of the article, and in doing so we are convinced that the article only guarantees a person. ... from being unlawfully detained ... It will be observed that these are all rights relating to the person or body of the individual ...

[146] In *Lo Pui Sang and Others v. Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, Intervener) and Other Appeals* [2008] 4 SLR 754, when discussing art 9(1) of the Singapore Constitution (in *pari materia* with art. 8(1) of the Federal Constitution), Choo Han Teck J said:

> I do not think that the phrase 'personal liberty' in Article 9 was a reference to a right of personal liberty to contract. It has always been understood to refer only to the personal liberty of a person against unlawful incarceration or detention (emphasis added).

[147] It cannot be overly emphasised that the Federal Constitution has meticulously delineated matters of fundamental liberties, as set out in Part II of the Federal Constitution, consisting of arts 5 to 13. They are provisions that:

(a) ensure the liberty of the person (art. 5);

(b) prohibit slavery and forced labour (art. 6);

(c) provide protection against retrospective criminal laws and repeated trials (art. 7);

(d) legislate equality before the law and the rights to equal protection of the law (art. 8) regardless of citizenship;

(e) lay down the prohibition of banishment and freedom of movement (art. 9);

(f) promulgate freedom of speech, assembly and association (art. 10);

(g) ensure freedom of religion (art. 11);

(h) confirm the rights in respect of education (art. 12); and

(i) provisions that guarantee protection to property (art. 13).

[149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. *I therefore am inclined to adopt the approach of Suffian LP in government of Malaysia & Ors v. Loh Wai Kong that art. 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right of travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art. 9.* On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a peguam syarie falls outside the ambit of art 5. Article 5 thus is of no help to the respondent.

[25] The above decision completely knocks out the appellant's argument that *Lee Kwan Woh* is a later decision that is binding upon this court. Flowing from these judicial decisions, the law is thus settled as regards the meaning of personal liberty in art. 5(1) which is that it concerns with liberty relating to the person or body of the individual. It does not embody the right to passport or to travel abroad. This conclusion, if correct, must dispose of this appeal. Even so, in case it be wrong, it is necessary to consider this issue further in greater detail. The decision in *Lee Kwan Woh*, with the utmost respect, shows the consistent approach of the learned judge Gopal Sri Ram FCJ where it concerns the matter of interpreting the constitutional provisions affecting fundamental liberties in arts. 5(1) and 8(1) in that the constitutional provisions should be liberally and generously interpreted. There is without question nothing wrong with such approach and we also accept that the Constitution being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way with less rigidity and more generosity than Acts of Parliament. However, it is also a well-established principle as Suffian LP had authoritatively said in *Loh Wai Kong*, "that the meaning of words used in any portion of statute - and the same applies to a Constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. According to Raja Azlan Shah Ag LP (as His Royal Highness then was), respect must be paid to the language which has been used (see *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29). In fact, Mohamed Dzaiddin FCJ in *Sugumar*, in construing the words 'personal liberty' enjoined the court to give the meaning in the context of art. 5 as a whole. Thus, when we are called upon to interpret the provisions of art. 5(1), on a consideration of these authorities, it is clear that they are binding on this court and serve as useful guides in assisting this court to construe the same correctly.

[26] In our judgment, cls. (1) to (5) in art. 5 are not mutually exclusive and no clause in this article, to borrow the words of Krishna Iyer J, in *Maneka Gandhi v. Union of India* AIR 1978 SC 597, is an island in itself. The whole article is a code which embodies constitutional safeguards against transgression to all rights relating to the person or body of the individual. Accordingly, the correct approach would be to interpret art. 5(1) by looking at the other clauses of the article as well. By interpreting art. 5 as a whole, the Federal Court in *Loh Wai Kong*, *Sugumar* and *Victoria Jayaseele Martin*, held that the phrase 'personal liberty' meant liberty relating to or concerning the persons or body of the individual. It is indeed the very antithesis of physical restraint or coercion. Such interpretation effectively leaves no margin of doubt in our minds that it is correct when viewed in the context of the legislative history of our Constitution in particular the recommendation for art. 5 in 1957. The interpretation that has always been

accepted, in our view, is in consonant and consistent with the recommendations contained in the report of the Federation of Malaya Constitutional Commission 1957 (the report) whereby in Chapter IX at para. 162, the Constitutional Commission recommended art. 5 with the object clearly stated in the following terms:

> 162. Our recommendations afford means of redress, readily available to any individual, against unlawful infringements of personal liberty in any of its aspects. **We recommend (Art. 5) provisions against detention without legal authority of a magistrate** ... (emphasis added)

The Constitutional Commission subsequently reiterated the above clear object in Chapter XII where in para. 70 of the report it recommended that "the rights guaranteed should be freedom from arrest and detention without lawful authority, ...".

[27] The constitutional intention in respect of the protection of personal liberty in art. 5 as manifested in the above recommendation and the provisions itself therefore is plain, it is intended to afford means of redress against unlawful infringement of personal liberty in the aspect of detention without legal authority. This court in the case of *PP v. Yuneswaran Ramaraj* [2015] 9 CLJ 873; [2015] 6 MLJ 47 held that the legislative history of a statute is one of the most relevant considerations in determining the constitutionality of a statute or any of its provisions and the reasons for the enactment of the statute are the safest guides to its interpretation. We would adopt the decision in the above case and hold that this approach applies equally in interpreting the Constitution. Moreover, s. 17A of the Interpretation Acts 1948 and 1967 (Act 388) requires the court to interpret a provision of an Act that would promote the purpose or object underlying the Act. This approach too, according to this court in *Yuneswaran*, *supra*, applies equally in interpreting the Constitution.

[28] There is a further reason why the interpretation of the Federal Court in *Loh Wai Kong* is to be preferred. The decision in *Lee Kwan Woh* was very much swayed by the development in India when *AK Gopalan v. The State of Madras* AIR 1950 27 which was followed in *Loh Wai Kong* was overruled by the Indian Supreme Court in *Sambhu Nath Sarkar v. The State of West Bengal* AIR 1973 SC 1425 and the decision in *Maneka Gandhi*, *supra*, gave an extensive meaning to the expression 'personal liberty' in art. 21 of the Constitution of India when the Supreme Court held that the right to travel abroad fell under the said art. 21. It is to be observed that art. 21 of the Constitution of India is identical to cl. (1) of art. 5 of the Federal Constitution but both differ narrowly in their language in the sense that the words 'save in accordance with law' appearing in the latter are not used in the former, instead the words 'except according to procedure established by law' are used. For ease of reference, we reproduce art. 21 below:

> 21. Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law.

As it stands, art. 21, emphatic in its brevity, is typically conspicuous by the absence of clauses or provisions equipollent to cls. (2) to (5) of our art. 5. These provisions are found in art. 22 of the Constitution of India which also deals with safeguards against preventive detention. Thus, the provisions in respect of the protection of life and personal liberty in our cl. (1) of art. 5 stand on its own in art. 21 of the Constitution of India. This is where art. 5 of the Federal Constitution is in marked contrast to or differs considerably from art. 21 of the Constitution of India. In *AK Gopalan*, *supra*, where the validity of the Preventive Detention Act 1950 was challenged, the Supreme Court ruled that arts. 20 to 22 of the Constitution of India constituted a comprehensive code and embodied the entire constitutional protection in relation to life and personal liberty. Mukherjee J thus construed the words 'personal liberty' to mean liberty relating to or concerning the person or body of the individual and it was the antithesis of physical restraint or coercion.

[29] We have no hesitation, on a careful perusal of the report, to confidently state that art. 5 had its genesis in arts. 21 and 22 of the Constitution of India. In connection with this point, we think it is instructive to reproduce the relevant extracts from art. 22 of the Constitution of India:

> 22. Protection against arrest and detention in certain cases - (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
>
> (3) Nothing in clauses (1) and (2) shall apply:
>
> (a) to any person who for the time being is an enemy alien; or
>
> (b) to any person who is arrested or detained under any law providing for preventive detention.
>
> ...

There is no doubt in our minds that the present cls. (3), (4) and (5) of art. 5 of the Federal Constitution are identical to cls. (1), (2) and (3) of art. 22 of the Constitution of India respectively although there have been some changes in drafting. In fact, we would necessarily mention that the Constitutional Proposals 1957 contained the original cls. (3), (4) and (5) of art. 5 proposed by the Constitutional Commission which are similar in almost every detail to cls. (1), (2) and (3) of art. 22 of the Constitution of India. We now quote from the Constitutional Proposals 1957 the proposed art. 5:

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Upon complaint being made by or on behalf of any person to the Supreme Court or any judge thereof that he is being unlawfully detained, the Court or judge shall inquire into the complaint and may make an order requiring the person by whom or in whose custody such person is detained to produce the body of the person so detained without delay and to certify in writing the cause of the detention; and, unless the Court or judge is satisfied that he is being detained in accordance with the law, the Court or judge shall order the person detained to be released.

(3) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(4) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours from such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no person shall be detained in custody beyond the said period without the authority of a magistrate.

(5) Nothing in clauses (3) and (4) shall apply to any person who is an alien enemy.

[30] *AK Gopalan,* it will be remembered, was decided in 1950, seven years before our Constitution was promulgated. However, whilst in *AK Gopalan* arts. 20 to 22 were treated as a comprehensive code that embodied the entire constitutional protection in relation to life and personal liberty, the Constitutional Commission significantly took a different approach when it avoided having two separate articles dealing with the protection of this right and instead it merged both art. 21 and art. 22(1), (2) and (3) in the proposed art. 5. When art. 5 was drafted in this manner, it thus becomes immediately clear that it was intended to fuse these provisions into a comprehensive code in itself under one article as the provisions relating specifically to the protection to person or body of the individual against detention without lawful authority. It is also significant to emphasise that the inclusion of cl. (2) to art. 5, which we find, is not specifically provided in arts. 21 and 22 of the Constitution of India, further reinforces our opinion that the words 'personal liberty' in art. 5(1) deals with protection against deprivation of personal liberty as cl. (2) thereof is concerned with protection against unlawful detention which entitles a detainee to apply for his release by way of *habeas corpus*. Thus, there is without question that the manner in which art. 5 was drafted by the framers of our Constitution consciously or unconsciously has in effect rendered clearer and conclusive the interpretation by Mukherjee J in *AK Gopalan* and accepted by the Federal Court in *Loh Wai Kong* that the expression 'personal liberty' means liberty relating to the person or body of the individual which is the antithesis of physical restraint or coercion.

[31] In *Maneka Gandhi*, the Supreme Court broadly and expansively construed art. 21 giving to it the widest amplitude and implying many more rights including the so-called right to travel abroad. In our judgment, the broader interpretation of art. 21 of the Constitution of India adopted in *Maneka Gandhi* is possible as it stands on its own, sans specific provisions identical to cls. (3), (4) and (5) in art. 5 of the Federal Constitution. For the above reasons, the judicial decisions in *Loh Wai Kong* and its forerunners, *Sugumar* and *Victoria Jayaseele Martin* are distinguishable from *Maneka Gandhi*. The decision in *Lee Kwan Woh* regrettably did not address this issue. Neither did the learned judge there refer to the Federal Court's decision in *Sugumar* which disagreed with His Lordship's interpretation of art. 5(1) in *Tan Tek Seng*, *supra* and allowed the appeal by the Pihak Berkuasa Negeri Sabah. In fact, *Tan Tek Seng* was in effect overruled by the Federal Court in *Sugumar*. We note that the Court of Appeal in *Tan Tek Seng* and the Federal Court in *R Rama Chandran*, *supra*, did not refer to *Loh Wai Kong*'s decision either when it interpreted the word 'life' in art. 5(1) broadly. At the risk of repetition, we are going to say it again. The deliberate inclusion of cls. (2) to (5) to art. 5 by the framers of our Constitution, in our opinion, was done with the intention of treating all clauses in art. 5 as a comprehensive code for the purpose as earlier-stated. It is to be read as such and any change to it can only be effected by Parliament by way of an amendment. To allow the court to do so, in effect, would be usurping the powers of Parliament (*Yuneswaran*).

[32] Before leaving this issue, we caution ourselves that decisions from foreign jurisdictions like India or United States of America have to be approached with care as guides to the interpretation of individual articles in our Constitution. This is because of the wordings of constitutional provisions, which might minimise the utility of foreign law in domestic context (see the Privy Council's decision in *Ong Ah Chuan v. PP & Another Case* [1980] 1 LNS 181; [1981] 1 MLJ 64). We should decide cases before us in the light of our constitution, our own laws and the conditions in our country which are not necessarily the same as conditions in other countries (*PP v. Lau Kee Hoo* [1983] 1 LNS 21; [1983] 1 CLJ (Rep) 336, *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129). The Federal Court in *Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 3 CLJ 643; [2010] 4 MLJ 1 declined to revisit the case of *Sugumar* as it was of the view amongst others that it should perhaps be taken up again with a bigger members bench of the apex court. For our part, having regard to the reasons we have given above, we do not think that in construing the term 'personal liberty' we should accord the meaning giving to it the widest amplitude as propounded in *Lee Kwan Woh*. That being the case, the decisions in *Loh Wai Kong*, *Sugumar* and *Victoria Jayaseele Martin* are, in our view, correct and are still good law. It follows therefore that nothing material turns upon the

appellant's argument that the respondents' decision is an infringement of arts. 5(1) and 8(1) of the Federal Constitution. The whole argument on this point is, in our view, wholly unmeritorious and must be rejected.

[33] It is strenuously contended on behalf of the appellant that the respondents' decision violates the rules of natural justice as the appellant was not afforded the right to be heard before the first respondent. According to learned counsel, s. 59 of Act 155 relied on by the learned judge when she held that the appellant had no right to be heard, is unconstitutional as it offends the principles of natural justice firmly embedded in arts. 5(1) and 8(1) of the Federal Constitution. Section 59 of Act 155 is couched in the following terms:

> Exclusion of right to be heard
>
> 59. No person and no member of class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

[34] Before we examine this argument, we will begin by stating that there is always a presumption in favour of constitutionality of statutes. The court can declare a statute to be an invalid piece of legislation but the burden is upon a person who attacks it to show that there has been a clear transgression of the constitutional principles. This court in *Yuneswaran*, *supra*, held that it is only when there is a clear violation of a constitutional provision beyond reasonable doubt that the court should declare a provision to be unconstitutional. What we ourselves consider to be the correct position is that although the right to life and personal liberty is guaranteed under art. 5, any deprivation of such right is allowed if it is in accordance with law. Section 59 is in our opinion one such law enacted by Parliament. The section expressly excludes right to be heard before the Minister or the Director-General, or in the case of an East Malaysian State, the State Authority, as the case may be, makes any order against any person including the appellant in respect of any matter under the Act or any subsidiary legislation made thereunder. Therefore, there is no issue of a denial of the right to be heard under Act 155 or an infringement of art. 5 when such denial of right is carried out in accordance with the law lawfully enacted by the competent Legislature to exclude such right.

[35] We have been reminded that the word "law" in the phrase of 'save in accordance with law' should not be given literal interpretation, it must, according to Lord Diplock in the seminal Singapore case of *Ong Ah Chuan*, *supra*, refer to a system of law which incorporates the fundamental rules of natural justice that had formed part and parcel of the common law of England, that is to say the rule of law and all its integral components and in both its procedural and substantive dimensions. In order to dispose of the

appellant's argument on this point, we accept that the expression 'law' includes written law and common law. By virtue of the definition of the word 'law' in art. 160(1) of the Federal Constitution, common law which is part of the law, is the common law insofar as it is in operation in the Federation. The common law insofar as it is in operation in Peninsular Malaysia, Sabah and Sarawak is that part of the common law of England as administered in England on 7 April 1956, 1 December 1951 and 12 December 1949 respectively. This is very clearly provided in s. 3(1) of the Civil Law Act 1956 (Act 67). However, the reception and the applicability of the English common law to Malaysia is expressed to be subject to any written law in force in Malaysia so that where there is a provision which has been made or hereafter will be made by any written law, the English common law does not apply. Its application is also only to the extent that the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. That, in our judgment, is the extent of the reception and the application of the common law of England in Malaysia. Article 5(1) itself envisages the possibility of and in fact, allows Parliament to provide for deprivation of the right embodied therein which necessarily includes the fundamental rules of natural justice being an integral part of the common law of England. Section 59 of Act 155 therefore is not unconstitutional and does not offend art. 5(1). We refer, in this connection, to the Federal Court's decision in the case of *PP v. Lau Kee Hoo* [1983] 1 CLJ 21; [1983] CLJ (Rep) 336; [1983] 1 MLJ 157 wherein Suffian LP in dealing with the issue of whether death penalty offends art. 5(1) held:

> Thus it will be seen that the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional.

[36] In *Sugumar*, a similar attempt was made to urge the court to hold that s. 59 of Act 155 was unconstitutional on the ground that without the right of being heard infringed the respondent's right to livelihood which was guaranteed by arts. 5(1) and 8(1) of the Federal Constitution. The Federal Court in *Sugumar* observed that the right under art. 5(1) was not absolute. Section 59 of Act 155 in plain and clear words had excluded the *audi alteram partem* rule for the cancellation of the respondent's entry permit. It was held that the constitutional rights as guaranteed under art. 5(1) could be taken away in accordance with law. Hence s. 59 of Act 155, which removed the *audi alteram partem* rule, which was duly enacted by Parliament was valid and constitutional.

[37] Similarly, in *PP v. Yee Kim Seng* [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 it was held that art. 5(1) was not infringed because the accused was not going to be deprived of his life or personal liberty except in accordance with law. If the law is within the competence of the Legislature to pass, such law does not breach the Constitution. Thus in *Government of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 LNS 28; [1977] 1 MLJ 133, the Privy

Council held that where the respondent was, in consequence of the amending Act, deprived of property there was no breach of art. 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to make. The constitutional guarantee in art. 5(1) is not absolute. Needless to say, this is the Federal Court's decision as such it is binding on this court.

[38] The Privy Council in *Ong Ah Chuan*, *supra*, having stated that the word 'law' in art. 9(1) of the Constitution of Singapore which is identical to our art. 5(1), held that there was nothing unconstitutional in the provisions for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. Capital punishment was a matter for Parliament. It was not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it was validly made. Applying the judicial decisions in *Ong Ah Chuan* and *Lau Kee Hoo*, we hold that s. 59 is not unconstitutional. Such provision is validly enacted by Parliament within its legislative competence as it is envisaged in art. 5(1) that such law can be made. Parliament by virtue of arts. 74(1) and 5(1) is clothed with power to enact whatever law it thinks appropriate or necessary on any matter within its legislative competence. This is a question of policy to be debated and decided by Parliament. As the Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 had put it at p. 188:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter the political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution ...

We have no doubt at all that s. 59 of Act 155 is consistent with art. 5(1). Our decision, it must be emphasised, is equally applicable to art. 8(1) as there is no reason for us to conclude that s. 59 offends the said article. Equality before the law and equal protection of the law under art. 8(1) require that like should be compared with like. What art. 8(1) assures to the individual such as the appellant is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require some individuals within a single class should be treated differently (*Lau Kee Hoo*). There is no such allegation or evidence that the appellant had been treated differently. In our judgment, we find no difficulty whatsoever in holding that the appellant's argument on this issue is wholly unsustainable and must be rejected.

[39] The issue of legitimate expectation is raised in the course of counsel's submission before us. We are pressed with the argument that the appellant, having been granted a valid passport, has a legitimate expectation of being able to travel and leave the country. In *Sugumar*, it was argued that the respondent had a legitimate expectation of being accorded rights including expectation which went beyond enforceable legal rights, provided they had some reasonable basis. The Federal Court held that the respondent could not

be said to have any legitimate expectation that his entry permit would not be cancelled given the express provision under Act 155 that such entry permit might be cancelled anytime. In addition, there was no such promise or representation made by the appellant that his entry permit would not be cancelled. Similarly, in the present case, there is no such promise or representation made by the respondents that even with a valid passport, the appellant will not be barred from leaving the country for a valid reason. Further, there is an express term in the passport that the passport is the property of the second respondent which may be withdrawn at anytime.

[40] The next contention by the appellant raises a question of some significance. Learned counsel for the appellant argues that the respondents in coming to their decision had done so in an abuse of discretion. This is because no cogent reasons had been given to the appellant. In exercising the powers under Act 155, the first respondent shall have the general supervision and direction of all matters relating to immigration throughout Malaysia. We find that there is no express or implied duty under Act 155 imposed on the first respondent to state reasons for his decision to the appellant. In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, the Supreme Court cited the case of *Marta Stefan v. General Medical Council* [1999] 1 WLR 1293 in which it was stated:

> The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. *But the trend is proceeding on a case by case basis (R v. Royal Borough of Kensington and Chelsea; Ex. p Grillo [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers*. (emphasis added)

The Federal Court, in *Sugumar*, adopted the above proposition that the trend of the law is towards giving reasons, but on a case by case basis; nonetheless, the trend had not lost sight of the established position of the law that there was no general duty universally imposed on all decision-makers. Mohamed Dzaiddin FCJ, delivering the judgment of the Federal Court, held that in exercise of the powers conferred upon the State Authority by s. 65(1)(c) of Act 155, the State Authority was not required to give reasons.

[41] The decisions in the above judicial authorities show that it is not in all cases that reasons must be given for a decision by the public authority for the established law is that there is no general duty universally imposed on all decision-makers to do so. In the present case, so far as the evidence shows, it is the respondents' case that the appellant was at the material time one of the persons under investigation by the Malaysian police for an offence allegedly committed under s. 124B of the Penal Code which is his alleged involvement in an activity detrimental to parliamentary democracy. The first respondent, we would say, is not obliged or under a duty to inform the

appellant that he is being investigated by the police and therefore is restricted from leaving the country. Needless to say, police investigation is confidential and has restriction on its disclosure. It is implicit in the nature of such investigation that it should remain confidential and any disclosure to a suspect or any other persons may jeopardise investigation. Thus, proceeding on a case by case basis, it is our judgment that based on the facts of the present case, the first respondent is not duty-bound and cannot be expected to provide reasons for his decision where the facts and the law are very clear, it cannot be any breach of duty where none exists in law. The respondents cannot be said to have deprived the appellant of any procedural fairness (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777).

[42] That takes us to the next question arising out of the appellant's contention on this point. Learned counsel's contention is couched in the terms that the first respondent did not exercise his discretion properly when he issued the instruction to stop the appellant from going abroad. He further submits that the first respondent acted under dictation or in a mechanical fashion having received a letter from the Inspector General of Police. The said letter was not produced, as such, learned counsel submits, the sole basis of the first respondent's evidence is inadmissible as it is hearsay evidence. To deal with these arguments, it would be desirable to consider the affidavit in reply affirmed by the first respondent on 15 January 2016. In para. 4.1, the first respondent stated that he received a letter dated 15 July 2015 informing him that the appellant was one of the persons specified in the said letter being investigated under s. 124B of the Penal Code. Further, in para. 4.2, the first respondent said that following the receipt of the letter, he instructed the Director of Security and Passport Division to block any application to obtain immigration services. As regards the appellant, exh. "MI-1" barred him from leaving Malaysia. It would clearly show from this affidavit that at no time did it state that the letter of 15 July 2015 directed or request the first respondent to bar the appellant from travelling abroad. Therefore, when the first respondent directed his officers to bar the appellant from travelling abroad, it is not possible to say that he did do so in mechanical fashion or under dictation from the Inspector General of Police. The letter only served to notify the first respondent that the appellant was being investigated. Based on the information, the first respondent exercised his discretion to bar the appellant from leaving Malaysia. Such decision is, in our judgment, arrived at with the proper and reasonable exercise of the first respondent's decision given the circumstances at the relevant time. The fact that the appellant was not charged in court subsequently and as learned counsel says 'there is simply no evidence to support the allegation' is irrelevant. The pertinent point to consider is that ultimately, the decision was made based on the information in the said letter at the relevant time that showed that there was a reasonable and proper basis upon which the discretion was exercised.

[43] The argument of the appellant which we may now consider as the last remaining question focuses on the issue of the failure on the part of the respondents to produce the letter dated 15 July 2015 which, learned counsel submits, would mean that the first respondent's averments in his affidavit are inadmissible as it is hearsay. We do not think that without the letter the respondents' averments in the affidavit in reply are hearsay. In para. 2 of the first respondent's affidavit, he clearly states that all facts deposed by him therein are based on his personal knowledge and records of the Immigration Department Malaysia of which he had accessed thereto. In any event, the letter in question was received by the first respondent. Exhibit "MI-1" which contains the first respondent's instruction to bar the appellant from leaving Malaysia bears the reference number of the letter dated 15 July 2015 which is 'Bil. KPN (PR) 15/26'. The omission is, in our opinion, not fatal. It shall be remembered that the appellant did not deny that he was being investigated either as a suspect or witness. Therefore, we hold that the affidavit in reply contains facts as the deponent namely the first respondent, is able of his own knowledge to prove as required under O. 41 r. 5 of the Rules of Court 2012.

[44] It is our conclusion, upon subjecting the impugned decision to anxious scrutiny, that the appellant fails to show that the same was made by the first respondent under the circumstances alluded to very early in our judgment or is amenable or susceptible to judicial review on the grounds set out in the appellant's application. In the end, we find that, for the reasons that we have given, all the questions raised by the appellant in this appeal lack merit and we do not think it necessary to formally interfere with the decision of the learned judge in refusing to declare the impugned decision of the first respondent as void and an order of *certiorari* to quash the same as well as special damages. Accordingly, this appeal, is one which we should consider appropriate to dismiss and which we now do. Parties are ordered to bear their own costs.